2010 WL 4773188 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.
Southern Division

Henry BROCKSCHMIDT and Linda Brockschmidt, individuals, Plaintiffs,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, a
corporation; and Does 1 through 30, inclusive, Defendants.

No. SACV 10-0030 JVS (ANx).
October 29, 2010.

Defendant Liberty Mutual Insurance Company's Memorandum of Points and Authorities in Support of Its Motion to Dismiss Plaintiffs' Third Cause of Action for Elder Abuse in Second Amended Complaint

Stephen J. Erigero (SBN 121616), Wendy L.R. Miele (SBN 165551), Ropers, Majeski, Kohn & Bentley, 515 South Flower Street, Suite 1100, Los Angeles, CA 90071-2213, Telephone: (213) 312-2000, Facsimile: (213) 312-2001, Email: serigero@rmkb.com, Attorneys for Defendant, Liberty Mutual Fire Insurance Company.

Date: December 6, 2010

Time: 1:30 p.m.

Dept. 10C

[Concurrently filed with Declaration of Stephen J. Erigero, Esq. re: Compliance with Local Rule 7-3; [Proposed] Order.]

[Trial: February 22, 2011]

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FEDERAL CASES

STATE CASES

FEDERAL STATUTES

TABLE OF AUTHORITIES
STATE STATUTES

I. *SUMMARY OF THE ARGUMENT*

A. *INTRODUCTION*

On or about **October 14, 2010,** Plaintiffs filed a Second Amended Complaint ("SAC") to add a third cause of action against Liberty Mutual for financial **abuse** of an **elder** under California's **Elder** **Abuse** and Dependent Adult Civil Protection Act ("the Act") (Cal. Welf. & Inst. C. §§ 15600, *et seq*.) This claim against Liberty Mutual is improper, as a matter of law, and should be dismissed for three reasons. First, plaintiffs do not allege facts that fall within the category of concerns that the Legislature expressly intended to remedy with the enactment of the Act. Second, plaintiffs allege no taking of property for a "wrongful use" as required by the Act's definition of "financial **abuse**." (Welf. & Inst. C., §15610.30(a).) Third, plaintiffs cannot plead a cause of action for financial **abuse** under the Act as it is only a remedy and not a substantive claim. Therefore, plaintiffs' third cause of action should be dismissed without leave to amend.

B. *PLAINTIFFS CANNOT ALLEGE ANY FACTS THAT FALL WITHIN THE AMBIT OF THE ACT*

After oral argument on **September 27, 2010**, the Court allowed plaintiffs leave to amend to state facts to allege liability under the Act guided by the Court's Tentative Order, which emphasized the category of concerns of financial **elder** **abuse** that the Legislature intended to remedy with the enactment of the Act: (1) those who suffer physical impairments and other poor health that place them in a dependent and vulnerable position; (2) those who have developmental disabilities and mental and verbal

limitations; and those who suffer because of the economic instability of the family and resentment of caretaker responsibilities (Cal. Welf. & Inst. Code, §15600(c) - (e).)

Plaintiffs allege: that they lived on a fixed income consisting of Mr. Brockschmidt's pension and social security benefits (SAC, ¶33); that Mr. Brockschmidt has Alzheimer's disease (SAC, ¶32); and that 68-year old Mrs. Brockschmidt had to conduct all the family business due to Mr. Brockschmidt's medical condition. (SAC, ¶¶32 & 33.) Plaintiffs, however, do not allege the necessary elements for the unique claim of financial **elder abuse** under § 15610.30. For example, there is no allegation that **both** plaintiffs were senile and subject to undue influence. In fact, typically, in **elder abuse** cases a personal representative or surrogate acts on behalf of the victim. Here, however, Mrs. Brockschmidt is quite sharp, and her allegation of financial **abuse** rests solely on her age.

Plaintiffs also have not alleged a wrongful taking by Liberty Mutual. Welf. & Inst.C. §15610.30(a) expresses the definition of financial **abuse** that occurs when a person or entity does any of the following:

• takes, secretes, appropriates, obtains or retains, any interest in real or personal property, for a **wrongful use**, or with intent to defraud or both;

OR

• assists in doing any of the above described acts;

OR

• does any of the above described acts through "undue influence" As defined in Civ.C., §1575.

Plaintiffs do not allege that Liberty Mutual committed fraud, constructive fraud, embezzlement, or conversion. Further, no case law has ever held that alleged wrongful withholding of insurance policy benefits is a "wrongful use."

Lastly, under the Act, financial **abuse** is only remedial in nature and imposes no liability on a defendant. Plaintiffs must establish tort theories as a basis for the claimed financial **abuse** "remedies." For example, the outright theft of money is no more actionable in a civil court than obtaining assets of an **elder** unfairly, as by the sale of financial instruments that are not reasonably suited to the needs of the **elder** or in contracts that contain unfair terms. (*Negrete v. Fidelity & Guaranty Life Ins. Co.*, 444 F. Supp.2d 998 (C.D. Cal. 2006).)

II. *FACTUAL BACKGROUND*

This action arises out of a claim made to defendant Liberty Mutual Fire Insurance Company by plaintiff-policyholders, Henry and Linda Brockschmidt, in **December 2008** after a leaking water softener caused damage to their home. As the Second Amended Complaint alleges, the parties dispute the extent of damage that could be properly attributed to the 2008 leak and, rather than accept the amount offered for the claim by Liberty, plaintiffs hired and paid a contractor to repair the alleged damage and filed this action against Liberty.

In their Second Amended Complaint ("SAC"), Plaintiffs assert claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) **elder** [financial] **abuse** pursuant to California statutory law, **Elder Abuse** and Dependent Adult Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600, *et seq.* ("the Act.") Liberty moves, pursuant to Fed.R. Civ. P 12 (b) (6), to dismiss the third cause of action for **elder** financial **abuse**.

III. *PROCEDURAL HISTORY*

This Court previously **granted** defendant Liberty Mutual Fire Insurance Company's Motion to Dismiss plaintiffs' third cause of action for financial **elder** **abuse** in its first amended complaint with leave to amend. In the Civil Minutes for the hearing on **September 27, 2010**, the Court ruled, in pertinent part, as follows:

> The Act [Cal. Welf. & Inst. C., §15600], absent clear language to the contrary, should not be interpreted to provide an additional cause of action, with additional remedies, to **elders** when they experience difficulty in getting their insurance claims paid to their satisfaction. Plaintiffs' allegations detail the communications with defendant's agents, claim adjusters, structural engineer, and their own general contractor, who performed repairs on the residence. They have alleged no facts that suggest their dispute with their insurance company falls into the category of concerns of **elder** financial **abuse** the Legislature intended to remedy with the enactment of the **Elder** **Abuse** and Dependent Adult Civil Protection Act.

IV. *STANDARD FOR DISMISSAL PURSUANT TO RULE 12(B)(6)*

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." (*Bell Atl. Crop. V. Twombly*, 550 U.S. 544, 570 (2007).) A claim has "facial plausibility" if the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (*Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009.)

In resolving a Rule 12(b)(6) motion under *Twombly*, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (*Iqbal, supra*, 129 S. Ct. at 1949.) Nor must the Court "accept as true a legal conclusion couched as a factual allegation. (*Id*. at. 1949-50 quoting *Twombly, supra*, 550 U.S. at 555.) Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." (*Id*. at. 1950.) This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct." (*Id.)*

V. *CALIFORNIA'S ELDER FINANCIAL ABUSE STATUTE WAS NOT INTENDED AS A REMEDY FOR ELDERS WHO DO NOT HAVE THEIR INSURANCE CLAIMS PAID TO THEIR SATISFACTION*

A. *ISSUE PRESENTED*

As the Court stated in its tentative ruling, the issue presented here is whether, under California's statutory protection against the financial **abuse** of the **elderly**, the statute applies to a situation, as alleged here, in which an insurance company allegedly unfairly and in "bad faith" withheld full payment of a homeowners insurance policy claim made by **elderly** insureds.

B. *FINANCIAL ELDER ABUSE STATUTE*

We first analyze the Act to determine its intent. The Act defines "financial **abuse**" of an **elder** as occurring when a person or entity does any of the following:
(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

(Cal. Welf. & Inst. Code, §15610.30(a)(1)-(3).)

Also pertinent here is §15610.30(b), which further provides:

> A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult.

The Act attempts to further clarify this definition:

> For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult.

(Cal. Welf. & Inst. Code, §15610.30(c).)

A "representative" is defined in §15610.30(d), which provides:
For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an **elder** or dependent adult.

(2) An attorney-in-fact of an **elder** or dependent adult who acts within the authority of the power of attorney.

C. *RULES FOR INTERPRETING A STATUTE*

In California, the rules governing statutory construction are well settled. The fundamental task "is to ascertain and effectuate legislative intent." (*People v. Trevino*, 26 Cal.4th 237, 240 (2001).) A court begins with the statutory language because it is generally the most reliable indication of legislative intent. "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.*, 2 Cal.4th 593, 601 (1992).) It is, however, a settled principle of statutory interpretation that "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*Brehm v. 21st Century Ins. Co.*, 166 Cal. App. 4th 1225, 1245 (2008).)

> Moreover, courts do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. Courts presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*Id.*)

D. *THE EXPRESS INTENT OF THE ACT*

1. *VULNERABILITY TO ABUSE OF ELDERS BY OSTENSIBLE CARETAKERS*

A broad, literal reading of the relevant provisions of the Act could be read to include, within the definition of "financial **abuse**", the alleged wrongful retention of insurance proceeds under the terms of a policy. However, in interpreting the legislative intent behind enacting the Act, the Act itself sets forth its intent. It was not the Legislature's intent to create an entirely new body of law governing ordinary commercial and personal financial transactions of California's **elders**. The Legislature's intent, rather, focused on the vulnerability of **elders** to **abuse** by their ostensible caretakers, which is set forth as follows:
(a) The Legislature recognizes that **elders** and dependent adults may be subject to **abuse**, neglect, or abandonment and that this state has a responsibility to protect these persons.

(b) The Legislature further recognizes that a significant number of these persons are **elderly**. The Legislature desires to direct special attention to the needs and problems of **elderly** persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of **abuse**, neglect, and abandonment.

(c) The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to **abuse** and incapable of asking for help and protection.

(d) The Legislature recognizes that most **elders** and dependent adults who are at the greatest risk of **abuse**, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position.

(e) The Legislature further recognizes that factors which contribute to **abuse**, neglect, or abandonment of **elders** and dependent adults are economic instability of the family, resentment of caretaker responsibilities, stress on the caretaker and **abuse** by the caretaker of drugs or alcohol.

(f) The Legislature declares that this state shall foster and promote community services for the economic, social and personal well-being of its citizens in order to protect those persons described in this section.

(g) The Legislature further declares that uniform state guidelines, which specify when county adult protective service agencies are to investigate allegations of **abuse** of **elders** and dependent adults and the appropriate role of local law enforcement is necessary in order to ensure that a minimum level of protection is provided to **elders** and dependent adults in each county.

(h) The Legislature further finds and declares that infirm **elderly** persons and dependent adults are a disadvantaged class, that cases of **abuse** of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this **abuse** due to problems of proof, court delays, and the lack of incentives to prosecute these suits.

(Cal. Welf. & Inst. Code, §15600, *et seq.*)

In sum, the category of concerns that the Act intended to protect against are **elders** with developmental disabilities, mental and verbal limitations, physical handicaps, and health issues making them potentially vulnerable to their ostensible caretakers, including those in a fiduciary relationship to them.

2. *PLAINTIFFS DO NOT ALLEGE THEY FALL WITHIN THE CATEGORY OF CONCERNS THE ACT INTENDED TO PROTECT*

In the SAC, plaintiffs make the following pertinent allegations:

• Mr. Brockschmidt has Alzheimer's disease (SAC, ¶32);

• 68-year old Mrs. Brockschmidt has had to conduct all the family business due to Mr. Brockschmidt's medical condition. (SAC, ¶¶32 & 33.)

• Mr. and Mrs. Brockschmidt are retired and live on a fixed income consisting of Mr. Brockschmidt's pension and social security benefits. (SAC, ¶ 33.)

Although these new allegations in the SAC, may show that plaintiffs meet the definition of an **elder** under the Act. None of these allegations fall within the category of concerns that the Act intended to address. For example, Mr. Brockschmidt may have Alzheimer's disease, but it was Mrs. Brockschmidt, who is quite sharp, that admittedly conducts all the family business. The SAC does not allege that she has any mental or verbal limitations that made her particularly vulnerable to Liberty Mutual's alleged improper adjustment and partial denial of plaintiffs' claim. Furthermore, the Act does not state that it was intended to protect people who live on fixed incomes, as many people do.

Additionally, the following new allegations do not address any of the concerns that the Act was intended to address, but rather, go to the issue of whether there was a "genuine dispute" as to coverage: [1]

• Liberty Mutual hired a biased professional engineer, John Doyle, to investigate the damage to the Brockschmidts' residence. Doyle had worked for Liberty Mutual on 11 prior occasions. (SAC, ¶ 34.)

• Liberty Mutual refused to acknowledge the true extent of damages to plaintiffs' home to protect its own financial interests at the expense of the Brockschmidts, who are **elders**. (SAC, ¶ 39, 43.)

• Liberty Mutual ignored plaintiffs' uncomfortable living conditions while the house was not repaired, which was not back to its normal condition until July 2009. (SAC, ¶ 41.)

• Plaintiffs did not have the financial ability to hire someone to dispute Doyle's report, which was unfair to them as **elders**, living on a fixed income. (SAC, ¶ 44.)

When plaintiffs' allegations are viewed in light of the expressed intent of the Act, it is clear that the Act should not be interpreted to provide an additional cause of action, with additional remedies, to **elders** when they experience difficulty in getting their insurance claims paid to their satisfaction. Plaintiffs have alleged no facts that suggest that their dispute with Liberty Mutual falls into the category of concerns of **elder** financial **abuse** that the Legislature intended to remedy under the Act.

3. *PLAINTIFFS DO NOT ALLEGE A CUSTODIAL OR FIDUCIARY RELATIONSHIP WITH LIBERTY MUTUAL*

The express Legislative intent of the Act is to protect **elders** from their ostensible caretakers, which case law has also determined to be those owing fiduciary duties to **elders**. Plaintiffs, however, do not and cannot allege that Liberty Mutual is in a fiduciary relationship with plaintiffs. Under California law, courts have held that an insurance company does not act in a fiduciary capacity to its insured. "The insurer-insured relationship is not a true 'fiduciary relationship' in the same sense as the relationship between trustee and beneficiary." (*Negrete v. Fidelity & Guar. Life Ins. Co.*, 444 F. Supp.2d 998, 1003 (C.D. 2006); See also, *Solomon v. North American Life & as. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998) [insurer owed no fiduciary duty to an insured as a result of their insurer-insured relationship]; (*Kanne v. Connecticut General Life Ins. Co.*, 607 F. Supp. 899 (C.D. Cal. 1985), *rev. on other grounds*, 859 F.2d 96 (9th Cir. 1988) ["California law does not recognize an action for breach of fiduciary duty between an insured an insurer."]) Liberty Mutual sold plaintiffs a homeowners insurance policy. They had a typical insurer-insured relationship, and therefore, under California law, no fiduciary relationship exists between Liberty Mutual and plaintiffs.

4. INSURER OWES A FIDUCIARY DUTY ONLY WHERE INSURER EXCEEDS ROLE AS A TYPICAL INSURER

The only time that an insurer has been held to owe a fiduciary duty and be subject to California's **Elder** **Abuse** Act is when it acts more than an insurer. (*Twomey v. Mitchell, Jones & Templeton, Inc.*, 262 Cal.App2d 690, 708 (1968) [found that a broker providing investment advice owed a fiduciary duty to advisee.] In *Negrete, supra,* 444 F. Supp. 2d at p. 1004, the court denied Fidelity & Guarantee Life Insurance Company's ("F&G") motion to dismiss concluding that the relationship alleged in plaintiff's complaint was not simply that of an insurer-insured, but rather one that entailed a fiduciary duty. The court specifically referenced the following paragraph in plaintiff's complaint:

> By virtue of their purported positions as financial advisors, estate planning specialists, and because of their superior knowledge and ability to manipulate and control senior citizens' finances and legal status, the [managing general agents] and the [national marketing organizations], owned, operated and/or controlled by defendant who marketed and sold F&G annuities to senior citizens assumed fiduciary duties owed to Mr. Ow and the Class. (*Id*.)

In *Negrete*, plaintiff conservator brought a class action suit on behalf of the class representative against defendant F&G alleging multiple claims in connection with the sale of annuities to older persons. The company moved to dismiss the claims of **elder** **abuse** in violation of California's **Elder** **Abuse** Act and breach of fiduciary duty. The conservator alleged that F&G defrauded the class representative into purchasing a deferred annuity that matured after his actuarial life expectancy. The class action sought to halt and remedy the harm caused by the F&G's fraudulent and unlawful sales practices in connection with deferred annuity products to senior citizens where the date that distribution payments from the annuity was beyond the actuarial life expectancy.

The court stated that the conservator stated a claim for **elder** **abuse** because it was alleged that the company fraudulently acquired millions of dollars by engaging in a "churning" scheme, specifically, using deceptive practices to deplete the accumulated cash value from an existing life insurance policy or annuity. The conservator's allegations were also found sufficient to state a claim for common law breach of fiduciary duty against F&G in that the relationship alleged was not simply that of an insurer-insured, but rather one which could entail a fiduciary duty.

Similarly, in *Zimmer v. Nawabi*, 566 F. Supp.2d 1025 (E.D. CA 2008), the court granted an **elderly** borrower's motion for summary judgment on her breach of fiduciary duty claim and **Elderly** **Abuse** Act claim against a mortgage broker that received fees wrongfully obtained as a result of the employees' false statements. The court stated that under California law a mortgage loan broker acts in a fiduciary capacity. This duty obligates brokers to make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost good faith toward their principals. A mortgage broker breaches this duty if he or she provides materially misleading an incomplete information regarding the terms of a loan, even if the correct terms are in the loan documents and the borrower does not read the written documents. (*Id*. at p. 1032.)

As plaintiff's broker, the court determined that Golden State Financing Corporation and its employees owed these fiduciary duties to the 79 year-old plaintiff. Based on plaintiffs' age and Nawabi's misrepresentations that the terms of her home refinance loan would be different than the actual terms of the loan, the held that the broker was liable under the financial **abuse** subsection of the **Elder** **Abuse** Act.

By contrast, the northern district court granted defendant Conseco Life Insurance Company's motion to dismiss plaintiffs' breach of fiduciary duty cause of action in its first amended complaint finding that plaintiffs failed to allege facts supporting their contention that the defendant insurers assumed duties exceeding the typical insurer-insured relationship. The court pointed out that plaintiffs alleged that the life insurance policies at issue were "investment vehicles" and that the policyholders could elect to stop making payments or to take loans out against the value of the policy. "These allegations do not establish that, like the

insurers in *Negrete*, defendants acted as financial advisors and estate planning specialists." (*Brady v. Conseco, Inc. and Conseco Life Ins. Co.*, 2009 U.S. Dist. LEXIS 65516 (N.D. Cal., Dec. 29, 2009.)

Liberty Mutual sold homeowners insurance to plaintiffs. Plaintiffs allege that plaintiffs "entrusted Liberty Mutual with their homeowner insurance coverage needs for over 62 years." (FAC, ¶45.) It is not alleged, and plaintiffs cannot allege that Liberty Mutual acted as a financial planner of plaintiffs' estate or provided financial advice to them. Liberty Mutual provided plaintiffs with homeowners' insurance that was subject to the terms, conditions and exclusions of the policy. Liberty Mutual and plaintiffs had a typical insurer-insured relationship, and plaintiffs have not and cannot allege that such a relationship was exceeded. Therefore, plaintiffs' allegation that there was a fiduciary relationship between them is improper as a matter of law. Furthermore, because there was no fiduciary relationship, plaintiffs cannot satisfy the requirements of the financial **abuse** portion of the **Elder Abuse** Act. Therefore, Liberty Mutual's motion to dismiss must be granted.

E. *NO "WRONGFUL USE" ALLEGED*

The financial **abuse** portion of the Act also requires a "wrongful use" to be alleged under §15610.30(b), which provides:

> A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a **wrongful use** if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult. (bold added.)

With respect to the statute's "wrongful use" requirement, plaintiffs argue that they have alleged a "wrongful use" contending that it is sufficient, under the statute, simply to allege that Liberty Mutual should have known that its conduct of allegedly depriving plaintiffs of policy benefits was likely to be harmful to an **elderly** couple living on a fixed income. "Wrongful use" is not otherwise defined in the statute, and plaintiffs supply no legal authority suggesting refusal to pay policy benefits constitutes a "wrongful use" or financial **elder abuse**.

The wrongfulness element can be satisfied by fraud, constructive fraud, undue influence, embezzlement, or conversion. (Balisok, ***Elder Abuse*** *Litigation* (The Rutter Group 2009) Financial **Abuse**, ¶8.21 (rev. # 1, 2009).) ["The range of possible schemes that might be addressed by remedies for financial **abuse** is too broad for comprehensive treatment. Each scheme, however, will be presumptively fraudulent or the product of actual fraud, undue influence and/or mistake."]

Plaintiffs, however, do not allege that Liberty Mutual committed fraud, constructive fraud, embezzlement, or conversion. Nor do plaintiffs allege Liberty Mutual exerted any undue influence on plaintiffs.

Further, no case law has ever held that alleged wrongful withholding of insurance policy benefits is a "wrongful use." Further, former § 15610.30(b) provided that bad faith was sufficient to satisfy the condition of wrongful use or intent to defraud. The "bad faith" language has since been deleted. Thus, plaintiffs' allegations of bad faith refusal to pay insurance policy benefits do not amount to "wrongful use."

At best, plaintiffs allege a "genuine dispute" over coverage where Liberty Mutual denied plaintiffs claim based on its reasonable reliance on the opinion of its registered professional engineer, John Doyle. Doyle concluded that plaintiffs claim for damage to the foundation of their home was pre-existing damage and was not caused by the water softener leak in **December 2008**. On **February 6, 2009**, Doyle investigated the issue of whether the water leakage caused or contributed to the sloped floor condition and cracking in the walls and ceilings in the kitchen and dining area. The Report stated, in pertinent part, as follows:
1. Expansive clay soils naturally occur at the site. Expansive clay soils are subject to significant swelling and shrinkage following wetting and drying.

5. The observed unlevel floor condition at the kitchen/dining room area, the uneven gap between the wall base plate and the floor, the cracking in the walls and ceilings above the dining room door, and the out-of-square condition of the door frame at the kitchen/dining room were caused by long-term soils-related differential movement of the foundation and floor support footings that occurred several years ago. All of these conditions preexisted the two episodes of water leakage.

7. The possible (though minor) additional differential movement of the floor support piers below the kitchen that may have resulted from the water leakage has not materially increased the scope or the cost of the releveling effort that was already necessary to address the differential movement and cracking that existed at the Brockschmidt kitchen/dining room area prior to December 2008. The possible additional differential movement and widening of the wall and ceiling cracking does not, by itself, warrant the re-leveling and associated repairs that are proposed by Mr. Bonham. It is principally the pre-existing differential movement and cracking that warrants the proposed repairs.

Based on Doyle's professional opinion, Liberty Mutual denied coverage for that portion of plaintiffs claim. (See also SAC at ¶¶13,21&22.)

“Where there is a ‘genuine issue’ as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.” (*Jordan v. Allstate Ins. Co.*, 148 Cal.App.4th 1062, 1072 (2007).) (italics in original.) “The ‘genuine dispute’ doctrine may be applied where the insurer denies a claim based on the opinions of experts.” (McCoy, *supra*, 171 Cal.App.4th at p. 793.) “A court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability.” (*Fraley v. Allstate Insurance*, 81 Cal.App.4th at p. 1282 (2000).)

In Fraley, a fire caused damage to the insured homeowners' (the Fraleys) home, which was covered by their deluxe homeowners' policy issued by Allstate. The policy covered the actual cash value, or alternatively, the full replacement cost of the home if it was repaired or replaced within 180 days of the actual cash value payment. The issue was whether a homeowners policy required the Fraleys to repair or replace their damaged property within 180 days of a certain date as a prerequisite to obtaining replacement cost. The court of appeal concluded it did and affirmed summary judgment in favor of Allstate on the Fraleys' action for breach of contract and bad faith. The court of appeal held that the policy clearly required the Fraleys to comply with the 180-day period for full replacement costs benefits. Further, because there was a **genuine dispute** regarding Allstate's contractual obligations, the claim for bad faith failed as a matter of law. (Id. at p. 1293.)

As a matter of law, plaintiffs do not allege a “wrongful use” under the financial **elder** **abuse** statute, and therefore, the third cause of action must be dismissed.

F. *FINANCIAL ABUSE IS A REMEDY UNDER THE ACT AND NOT A SUBSTANTIVE CLAIM*

“Whether ‘financial **abuse**’ amounts to a new cause of action or whether it is remedial is an important question.” (Balisok, ***Elder*** ***Abuse*** *Litigation* (The Rutter Group 2009) ¶8:9, p. 8-6 (rev. # 1, 2010).) Pertinent here are §15610.30, which defines “financial **abuse** of an **elder**,” and §15657.6, which identifies remedies for financial **abuse**.
Until it has been decided whether financial **abuse** amounts to a substantive claim, or on the other hand is remedial, counsel must plead financial **abuse** ‘both ways.” A complaint should include a ‘cause of action for financial **abuse**,’ and also establish tort theories as a basis for the claimed financial **abuse** ‘remedies.’. . .The outright theft of money is no more actionable in a civil court than obtaining assets of the **elder** unfairly, as by the sale of merchandise, services or financial instruments that are not reasonably suited to the needs of the **elder**, or in contracts that contain unfair terms. (*Negrete, supra*, 444 F. Supp.2d at p. 998.)

(***Elder*** ***Abuse*** *Litigation*, *supra*, at ¶8:15, p. 8-7.)

All of the cases that allege financial **abuse** also allege a tort theory as a basis for the claimed financial **abuse** remedy. For example, typically, cases of financial **abuse** also allege a breach of fiduciary duty or a fraudulent conveyance and do not seek liability on a theory of financial **elder** **abuse** **alone**. (See, *Zimmer*, *supra*, 566 F. Supp.2d at p. 1025; and *Negrete*, *supra*, 444 F. Supp.2d at p. 1003.) Plaintiffs rely on a theory of recovery that is not recognized as substantive claim by itself, and therefore, Liberty Mutual's motion to dismiss should be granted.

VI. *CONCLUSION*

Liberty Mutual respectfully requests the court grant its motion to dismiss plaintiffs' third cause of action under the **Elder** **Abuse** Act because plaintiffs assert a theory of recovery that is improper as a matter of law. Plaintiffs can allege no set of facts in support of their claims which would entitle them to relief under the statute. Further, plaintiffs cannot allege that Liberty Mutual's refusal to pay policy benefits constitutes a "wrongful use." Additionally, Liberty Mutual requests that the court strike all of the damages as well as attorneys' fees and costs that plaintiffs seek to recover under the third cause of action.

Dated: October 29, 2010

Respectfully Submitted,

ROPERS, MAJESKI, KOHN & BENTLEY

By: */s/ STEPHEN J. ERIGERO*

STEPHEN J. ERIGERO

WENDY MIELE

Attorneys for Defendant

LIBERTY MUTUAL FIRE INSURANCE

COMPANY

Footnotes

1 "A legitimate dispute as to the insurer's liability precludes bad faith liability under the 'genuine dispute' doctrine." (*Chateau Chamberay Homeowners Assn'n v. Associated Int'l Ins. Co.*, 90 Cal.App.4th 335, 346-347 (2001).)

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